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IN THE

Supreme Court of the United States

MARCH TERM, 1974

No. ...73-1299

PASCOE STEEL CORPORATION, a Georgia corporation,

Petitioner,

vs.

WIEMAN-SLECHTA CO., a Nebraska corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Pascoe Steel Corporation, prays that a writ of certiorari issue to review the order of affirmance of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on October 24, 1973, and denying further the petition for rehearing entered by the United States Court of Appeals for the Eighth Circuit in this action in the above entitled case on November 20, 1973.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit entered its order of affirmance on the 24th day of October, 1973; it is reported as a Memorandum Decision in —— F.2d —, and is found in the Certified Record. A rehearing was denied on November 20, 1973. The order of affirmance entered by the court below was rendered on an appeal from the decision of the United States District Court for the District of North Dakota, Northeastern Division, dated December 13, 1972, reported at 351 F. Supp. 840, and is found in Appendix A. Pursuant to the Court's decision, a judgment was entered in favor of the respondent and against the petitioner in the amount of $55,449.71, on the 26th day of December, 1972.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Eighth Circuit was entered on the 24th day of October, 1973 (Certified Record). Rehearing was petitioned for and denied by order of the United States Court of Appeals for the Eighth Circuit on November 20, 1973 (Certified Record). Judgment on the mandate of the Circuit Court of Appeals was entered in the United States District Court for the District of North Dakota on the 3rd of December, 1973 (Appendix A). The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, Section 1254 (1) (62 Stat. 928, June 25, 1948, (c) 646, Sec. 1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the District Court, as affirmed by the Court of Appeals, violates Rule 52 of the

Federal Rules of Civil Procedure by reason of the failure of the trial court to find facts specially and state separately its conclusions of law thereon, with respect to issues fairly raised on the record, notwithstanding specific requests by the petitioner to do so, whether the refusal to decide issues fairly raised on the record is a denial of due process, and is contrary to the decisions of this Court, and inconsistent with and contrary to decisions of the Court of Appeals for the Eighth Circuit, as well as other circuits.

2. Whether the decision of the trial court as affirmed by the Court of Appeals for the Eighth Circuit is contrary to the statutory law of the State of North Dakota, and contrary to the decisions of the Supreme Court of the State of North Dakota, both with respect to the application of the parol evidence rule, and the law of the State of North Dakota governing the formation of contracts.

APPLICABLE LAWS INVOLVED IN THIS PROCEEDING

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

CRIMINAL ACTIONS—PROVISIONS CONCERNING—DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NORTH DAKOTA CENTURY CODE, SECTION 9-06-07

WRITTEN CONTRACT SUPERSEDES ORAL NEGOTIATIONS.—The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations and stipulations concerning this matter which preceded or accompanied the execution of the instrument. Vol. 1, North Dakota Century Code, p. 611.

NORTH DAKOTA CENTURY CODE, SECTION 9-01-02

REQUISITE OF CONTRACT.—It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. The consent of the parties;
3. A lawful object; and
4. Sufficient cause or consideration.

Vol. 1, North Dakota Century Code, p. 576.

STATEMENT OF THE CASE

This action was originally commenced in the United States District Court by Wieman-Slechta Co., a Nebraska corporation, against Pascoe Steel Corporation, a Georgia corporation. Jurisdiction of the United States District Court rests upon Section 1332 of Title 28 of the United States Code, there being diversity of citizenship between the parties and the sum in controversy exceeding $10,000, exclusive of costs.

The facts relevant to this case may be summarized as follows:

Pascoe Steel Corporation is generally engaged in the manufacture and fabrication of steel buildings and the distribution and sale thereof.

Wieman-Slechta Co. was a corporation based in Omaha, Nebraska, generally engaged in the construction business, and, at the time pertinent to this litigation, was a franchise dealer in steel buildings under a franchise agreement with Pascoe Steel Corporation.

In early April of 1970 a regional salesman for Pascoe Steel Corporation contacted Mr. Wieman, one of the principals of the respondent, concerning a bid for the construction and erection of a number of steel buildings for the Morrison-Knudsen Company at a construction site near Nekoma, North Dakota.

This construction project was incident to the construction of the anti-ballistic missile installation at or near Nekoma, North Dakota.

The discussions between the Pascoe representatives and Mr. Wieman took place the first week in April and represented a proposal on the part of Pascoe that Wieman-Slechta, together with Pascoe Steel, prepare a joint bid for the furnishing of steel building components and the erection thereof for the Morrison-Knudsen Company.

The day after this first discussion, the two principals of Wieman-Slechta, Mr. Wieman and Mr. Slechta, left Omaha and traveled to Grand Forks, North Dakota, where they met John McCarthy, the sales manager for Pascoe Steel. These men met with Morrison-Knudsen officials and secured information as to the particular building project (number, size of buildings, facilties to be included, and completion dates, etc.).

There were several meetings of Morrison-Knudsen officials, and meetings among the three men themselves when

they were formulating a joint bid for the project with Pascoe proposing to furnish the steel building components, and Wieman-Slechta proposing to perform the construction and erection of the buildings on the construction site. The joint bid was completed; and at an evening meeting with Morrison-Knudsen officials, the joint bid was submitted to Morrison-Knudsen. Morrison-Knudsen was represented by several of its personnel, including the project superintendent. The project was discussed, including the proposed completion date of the project and it was indicated at that meeting the completion date of the project was to be June 15, 1970. Also discussed were certain construction equipment that would be made available by Morrison-Knudsen, the unloading site at the railroad siding of the steel building materials was likewise discussed at the meeting.

The project superintendent indicated to both the representatives of Pascoe and Wieman-Slechta at that meeting that the joint bid would probably not be accepted in its form, but rather it was noted by the superintendent that if a separate contract were issued by Morrison-Knudsen to Pascoe Steel for the steel building components and if payment were made by Morrison-Knudsen directly to Pascoe, the usual one per cent cash discount if paid within ten days could be realized; and further, if a separate contract between Morrison-Knudsen and Wieman-Slechta for the construction work were entered into, the cost of the performance bond to be furnished by Wieman-Slechta would be reduced by reason of the elimination of the steel building components from the contract price. These two savings would approximate $2,000.

The meeting concluded at that point. Mr. Wieman and Mr. Slechta took Mr. McCarthy to the airport at Grand

Forks. There was some discussion about the delivery date of steel building components and thereafter the men parted and never again met.

On April 14, 1970, Wieman-Slechta and Morrison-Knudsen entered into a contract for the construction work incident to the erection of the steel buildings on the construction site. Subsequently, Wieman-Slechta entered into a subcontract with C. G. Welding for the erection of the steel buildings themselves. The contract price for the erection work with C. G. Welding was $37,000.

The contract between Wieman-Slechta and Morrison-Knudsen was in writing and specifically referred to in the separate contract between Morrison-Knudsen and Pascoe Steel and designated Wieman-Slechta as the agent for Morrison-Knudsen for the purpose of receiving the steel building components from Pascoe under its contract with Morrison-Knudsen. The contract was in writing and signed by authorized officials of both companies.

On April 15 Morrison-Knudsen issued a purchase order to Pascoe Steel for the purchase of 14 steel buildings with specifications and conditions attached to the purchase order. Among other things, the purchase order (contract) provided:

> "Seller (Pascoe) acknowledges that buyer (Morrison-Knudsen) has entered into a contract with Wieman-Slechta Company of Omaha, Nebraska, whereunder Wieman will, as agent for buyer (Morrison-Knudsen) receive and erect in place all buildings ordered hereunder."

The contract between Morrison-Knudsen and Pascoe also had a delivery schedule indicating the dates the first shipments were to be shipped and the sequence of shipments of the building components.

The purchase order dated April 15, 1970, was received by Pascoe Steel on April 29, 1970, and pursuant to some telephone conversations and an exchange of correspondence to clarify questions raised by Pascoe, the purchase order was amended and the amendment was dated May 7, 1970.

Two of the significant amendments in the purchase order were, in the original purchase order with Pascoe, the building components were to be delivered at the railroad siding at Nekoma, North Dakota. Under the amendment to the purchase order dated May 7 the building components were to be delivered to Morrison-Knusen Company F.O.B. Cars—Vendor's Plant, Columbus, Georgia. The other significant amendment to the purchase order was an amendment to the shipping schedule.

Following the issuance of the amended purchase order which was the contract between Pascoe and Morrison-Knudsen at Pascoe's plant at Columbus, Georgia, they were shipped at Morrison-Knudsen's expense from Columbus, Georgia, to Nekoma, North Dakota, the site of the construction project.

There were variations from the shipping schedule and the building components did arrive at the job site later than either Wieman-Slechta or Pascoe had originally anticipated. However, the greatest delay in the delivery occurred after Pascoe had delivered the components to Morrison-Knudsen at Columbus, Georgia, the delay occurring during the transhipment from Columbus, Georgia, to Nekoma, North Dakota.[1]

After the building components were delivered, Pascoe

[1]In this connection see the trial court's findings with respect to the date of shipment which was the delivery date by Pascoe to Morrison-Knudsen, and the arrival date of the components in Nekoma, North Dakota, at 351 F.Supp., 840 at page 845. (Appendix A)

was paid in full by Morrison-Knudsen and that ended the transaction from Pascoe's standpoint.

Wieman-Slechta erected the buildings, and after their erection in concluding their transaction with Morrison-Knudsen put in a claim for damages by reason of the delay in the arrival of the building components at the building site and were ultimately paid, as a result of negotiation, $15,000 by Morrison-Knudsen in addition to the contract price of its buildings for the delays which they had suffered. Pascoe was not part of the negotiations and did not contribute part of the $15,000.

Thereafter Wieman-Slechta commenced suit against Pascoe Steel Corporation in the United States District Court for the District of North Dakota for damages for delays in the delivery of the building components. The claim for damages resting on Wieman-Slechta's claim of an oral agreement between its principal officers and one John McCarthy, a sales representative of Pascoe, arrived at or entered into at Grand Forks, North Dakota, at the time of the submission of the joint bid to Morrison-Knudsen Company, the contract being oral in nature.

The defenses interposed by Pascoe Steel were:

1. That any oral negotiations conducted between the representatives prior to the entry into written contracts were superseded by the written contracts, and the provisions of the written contracts could not be amended or modified by evidence of oral negotiations prior to the execution of such instrument (instruments in which Wieman-Slechta was denominated the agent for Morrison-Knudsen Company).

2. That the plaintiff's evidence failed to establish the legal requirements of a contract between Pascoe Steel and Wieman-Slechta.

3. That Wieman-Slechta's evidence failed to establish that any delays in the delivery of the component parts were the responsibility or caused by Pascoe Steel.

4. That Wieman-Slechta had failed to establish any admissible evidence of damage resulting from the alleged delays.

The case was tried to the Court without a jury. The trial court after hearing the evidence, the arguments of counsel, and considering the briefs, entered its memorandum opinion which is reported at *Wieman-Slechta Co. v. Pascoe Steel Corporation*, 351 F.Supp. 840.

The trial court held in favor of Wieman-Slechta and against Pascoe Steel awarding Wieman-Slechta damages in the sum of $55.449.71 plus interest and costs.

An alternative motion for amended findings or a new trial was filed by Pascoe (page A-77, Appendix; Certified Record) wherein, among other things, the Court was asked to modify the Findings of Fact in a manner which specifically applied the parol evidence statute (Section 9-06-07, North Dakota Century Code) and the North Dakota statute relating to the formation of contracts (Section 9-01-02, North Dakota Century Code).

In the oral argument and in the brief submitted to the Court in support of the defendant's alternative motion, the Court's attention was specifically called to the provisions of Rule 52 of the Federal Rules of Civil Procedure and asked to make specific findings on each issue fairly raised in the record. The Court's attention was further called to the fact that the Court's Memorandum Opinion (Appendix A) ignored entirely and at no place commented upon any

of the four defenses raised by the petitioner to the respondent's complaint.

The petitioner's alternative motion for amended findings or a new trial was denied by the trial court on February 9, 1973 (Certified Record - Appendix, p. A-104).

Notice of appeal to the court of Appeals for the Eighth Circuit was filed and served on February 27, 1973 (Certified Record - Appendix, p. A-104).

This cause was argued before the Court of Appeals for the Eighth Circuit on October 16, 1973; the Court's order of affirmance pursuant to Rule 14 of the Rules of the Court of Appeals for the Eighth Circuit was entered and filed on October 24, 1973. The order of affirmance is shown on page 1 of the proceedings in the Court of Appeals for the Eighth Circuit, part of the Certified Record.

A Petition for Rehearing In Banc was filed on November 8, 1973, and denied without opinion by the Court of Appeals on November 20, 1973. The Petition for Rehearing and the order denying the same are shown at pages 2 and 13 respectively of the proceedings before the Court of Appeals which are part of the Certified Record.

JURISDICTION OF THE TRIAL COURT

The trial court's jurisdiction to hear this cause obtains by virtue of Section 1332 of Title 28 of the United States Code, there being a diversity of citizenship between the parties plaintiff and defendant, and the sum in controversy exceeding $10,000 exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Two of the defenses raised in the trial court, by the petitioner, if sustained, would have constituted a complete

bar to the respondent's right to recover. Those issues were the applicability of the parol evidence rule and the right of the respondent to recover on an alleged oral agreement entered into prior to the execution of written contracts, and the defense that respondent's evidence failed to establish the legal requirements of a contract between Pascoe and Wieman-Slechta under the laws of the State of North Dakota.

The other two defenses, i.e., that Wieman-Slechta had failed to establish any delays in delivery of material which were the responsibility of Pascoe and that Wieman-Slechta had failed to offer any admissible evidence of damage, could have resulted only in precluding or reducing the recovery of damages if they did not constitute a complete bar to recovery.

The refusal of the courts below to follow Rule 52 of the Federal Rules of Civil Procedure is a denial of due process.

Four times the petitioner was before a court: twice before the trial court on the main trial and on the petitioner's alternative motion for amended findings or a new trial; and twice before the Court of Appeals for the Eighth Circuit on the main argument and on the Petition for Rehearing. The petitioner specifically requested that the Court rule on the defense of the parol evidence statute.[2] Neither the trial court nor the Court of Appeals has in its opinion even acknowledged that the issues were part of the trial, part of the evidence, and were issues submitted to the Court for its determination.

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[2]In North Dakota the commonly known "parol evidence rule" has been enacted into statute—Section 9-06-07, North Dakota Century Code.

This is a significant departure from the accepted and usual course of judicial proceedings, on the part of the appellate court, whose Order of Affirmance and Order Denying the Petition for Rehearing sanctioned a significant departure by the lower court from the accepted and usual course of judicial proceedings so as to justify this Court's exercise of its powers of supervision.

Petitioner submits this is true because the trial court, during the course of trial, in response to an objection raising the defense of the parol evidence statute specifically acknowledged that this was the focal point of the petitioner's position and indicated that it was of the opinion, at that point in the record, that the parol evidence rule should be applied (Certified Record - Appendix, pp. A-24 and A-25).

The trial court completely ignores all issues in its Memorandum Opinion. Notice that the trial court's Memorandum Opinion cites no cases, no statutes, and no legal principles which support the decision or give the trial court's reason for its decision in holding for the plaintiff. The trial court's Memorandum Opinion cites no authorities of any kind which would support the trial court's rejection of the defensive positions and issues raised by the petitioner as the defendant in the trial court. The following decisions, the trial court's decision to deny the petitioner's alternative motion, the Court of Appeals' Order of Affirmance, and its order denying the Petition for Rehearing are completely bereft of either a discussion of issues, a discussion of facts, or a discussion of anything.

There is a reason why neither the trial court nor the Court of Appeals cited any court decisions, statutes or legal principles to support the decisions which were made. There aren't any. The petitioner states categorically that there

have been no cases and no statutes and no legal principles which have been discussed in the briefs of counsel, discussed by the Court in oral arguments or cited in any of the opinions of the trial court or the Court of Appeals which support or justify the decision in this case, either directly or by analogy.

On the other hand, the petitioner has cited cases, statutes, and legal principles in its brief to the trial court and to the Court of Appeals which do support its position.[3]

Ignoring an issue by a court in making its decision may be expedient and it may be convenient, but it does not decide the issue.

The Court has said that fair play is the essense of due process. *Galvan v. Press*, 74 S.Ct. 737, 347 U.S. 522, 98 L.Ed. 911, Rehearing Denied, 75 S.Ct. 17, 348 U.S. 852, 99 L.Ed. 671.

The Court of Appeals for the Ninth Circuit has stated that the present concept of due process stems from the American Ideal of fairness in the treatment of all and that due process is denied where the procedure tends to shock the sense of fair play. *Howard v. U. S.*, 272 F.2d 294, Cert. Den. 87 S.Ct. 2129, 388 U.S. 915, 18 L.Ed. 2d 1356.

Petitioner realizes that this Court has in several cases, by denying certiorari, allowed to stand the summary affirmance of cases appealed to the Courts of Appeal from the United States District Court cases where the summary affirmance was without opinion. It is submitted, however,

[3]The cases cited by Wieman-Slechta in its briefs to the trial court and to the Court of Appeals did cite cases to support its position and to argue against the position maintained by Pascoe, but none of the cases cited were similar factually, or even analogous, to the situation presented by the facts in this case, and, of course, no cases or principles are discussed by either the trial court or the Court of Appeals in its opinion.

that the instant case presents a situation where, from the very first decision by the trial court, to the order of the Court of Appeals of the Eighth Circuit denying the petition for rehearing, not even the slightest reference is made to the issues presented by the petitioner. If fairness is the essential element of due process, as this Court has said, does the record in this case meet this test of fairness? The petitioner submits it does not.

Is there any reason why—if the issues presented for determination by the petitioner were so simple, so obviously wrong, so patently without merit—that either the trial court or the Court of Appeals could have simply so stated and cited the cases or authorities which demonstrated the failing of the petitioner's position?

The trial court's Memorandum Decision (which includes its Findings of Fact and Conclusions of Law) does not conform to Rule 52 of the Federal Rules of Civil Procedure and is contrary to prior decisions of this Court and is not in accord with prior decisions of the Court of Appeals for the Eighth Circuit.

This Court in *Commissioner v. Duberstein*, 80 S.Ct. 1190, 363 U.S. 278, 4 L.Ed.2d 1218 (1960), in commenting upon the findings of the trial court stated:

> ". . . to be sure, conciseness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the district court's concept of the determining facts and legal standard may be. See Matton Oil Transfer Corp. v. The Dynamic, 123 F.2d 999, 1,000-1,001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts

> specially and state separately . . . conclusions of law thereon.' "

The Court of Appeals for the Eighth Circuit in opinions prior to this one to this case has said:

> "Findings of fact should be 'a clear and concise statement of the ultimate facts, and not a statement. report, or recapitulation of the evidence from which such facts may be found or inferred.' " *Brown Paper Mill v. Irvin*, 134 F.2d 337 (CCA-8, 1943).

And in *Cross v. Pasley*, 267 F.2d 284 (CA-8th, 1959), the Eighth Circuit held that findings of a trial court were inadequate:

> ". . . inasmuch as they do not furnish this court with a clear understanding of the grounds upon which the District Court based its decision."

The Court of Appeals for the Tenth Circuit in *Woods Construction Co. v. Pool Construction Co.*, 314 F.2d 405 (CA-10, 1963), stated the rule thusly:

> ". . . findings of fact must be made by the trial court as to each and every issue raised by the parties and remaining before him at the conclusion of the trial."

The opinions and orders of the courts below are not in accord with these principles stated above.

In view of the foregoing expressions as to the contents of the Findings of Fact and Conclusions of Law as required by Rule 52 of the Federal Rules of Civil Procedure, it would seem that the petitioner is clearly not wrong in expecting the trial court or the appellate courts to discuss the issues which this petitioner raised in its own defense and, if those defenses are to be rejected, the Court ought

to set forth its reasons for so doing and not simply ignore them as though they never existed.

The petitioner contends that the function of the judicial process is not simply to decide cases on convenient grounds, ignore the troublesome problems as though they never existed, and then—having made such a decision—to simply refuse to discuss the matter further. This is particularly true when the defeated party in this case—Pascoe—the petitioner herein, has submitted its defenses and raised its issues in good faith, in all seriousness, and was even informed by the trial court when an objection was made to the offer of evidence on the grounds that it violated the parol evidence statute, that the trial court believed the rule was correctly stated, and:

> ". . . I am of the opinion at this point that Mr. Woutat's position is pretty well taken that the results of the negotiations having been merged into a contract that it would be improper to permit parol evidence to attempt to vary them. . . ." (Certified Record-Appendix, pp. 24-25).

Despite this acknowledgment by the trial court of this position taken by the petitioner, the trial court makes no mention of the issue in its Memorandum Opinion, its order denying the post-trial alternative motion, nor does the Court of Appeals mention the issue in its Order of Affirmance and its Order Denying the Petition for Rehearing.

If the position of the petitioner was so lacking in merit, this could have easily been pointed out by the courts below, and the reasons upon which they base such determination easily and simply stated. Why wasn't this done?

Decision of the trial court as affirmed by the Court of Appeals for the Eighth Circuit is contrary to the statutory law of the State of North Dakota and contrary to the decision of the Supreme Court of the State of North Dakota, both with respect to the application of the parol evidence rule and the law governing the formation of contracts.

PAROL EVIDENCE RULE

What is commonly referred to as the "parol evidence rule" is statutory law in North Dakota. Section 9-06-07 of the North Dakota Century Code. This statute is set out in its entirety in this petition. The oral evidence offered by the respondent, Wieman-Slechta, and admitted by the Court over the objection of the petitioner, related only to an alleged oral promise on the part of the representative of the petitioner that:

> ". . . component parts of the buildings would begin arriving at the sites the first week in May . . ."
>
> (Quoted from the Court's Memorandum Opinion, 351 F.Supp. 840, at page 846).

The petitioner had a contract with Morrison-Knudsen and that contract included a delivery date and schedule. The delivery dates in the contract between the petitioner and Morrison-Knudsen provided:

> "Items 1 and 5—shipment week ending May 8, 1970, or before. Items 2, 3, 4, 6 and 7 shipment week ending May 15, or before. Items 8 and 9 shipment week ending May 22, or before." (See Exhibit 4, Devlin's letter of April 29 and purchase order dated May 7, 1970, Certified Record, Exhibit Volume, pp. E28, E29, and E37).

Wieman-Slechta's evidence and claim of the oral contract for delivery early in May are contrary to the written contract between petitioner and Morrison-Knudsen.

The significant point is that in the contract between petitioner and Morrison-Knudsen, the respondent, Wieman-Slechta, was specifically denominated the agent for Morrison-Knudsen (Certified Record - Exhibit Volume, p. E41). And in the respondent, Wieman-Slechta's own contract with Morrison-Knudsen, they were likewise denominated the agent for Morrison-Knudsen, the contract specifically saying:

> ". . . in that connection Contractor acknowledges Owner's purchase order with Pascoe Steel Corporation for buildings and will closely coordinate its efforts with the shipping schedule of Pascoe Steel Corporation . . ." (Certified Record - Exhibit Volume, p. E59).

It is to be noted that the petitioner and the respondent initially got into the transaction with Morrison-Knudsen planning to enter one joint bid for the project, that it was at Morrison-Knudsen's instance that separate contracts were issued, one a contract for the construction with respondent and Morrison-Knudsen, and the purchase order for the sale of the building component parts between Morrison-Knudsen and petitioner with both contracts being tied together by the Agency between Morrison-Knudsen and Wieman-Slechta.

While the contractual situation is a bit unusual and unique, the petitioner contends and contended in the courts below, that the written contracts, together with the agency relationship, in writing, between Morrison-Knudsen and the respondent precluded the reception of oral evidence

which tends to vary the terms of the written documents. In that connection see *Algood v. National Life Insurance Company*, 240 N.W. 874, 61 N.D. 763; and *Odegard v. Investors Oil, Inc.*, 118 N.W.2d 362, at page 372.

There is not sufficient evidence of an oral contract.

The respondent's case rests entirely on its ability to prove the alleged oral contract between Wieman and Mr. Slechta on the one hand, and John McCarthy, a sales representative of Pascoe Steel Corporation, on the other hand. Mr. McCarthy's testimony appears by deposition: it is Exhibit 11 (Certified Record - Exhibit Volume, p. E108) and the testimony of Mr. Wieman who testified that at the airport at Grand Forks, North Dakota, he and Mr. McCarthy had a conversation and:

> ". . . there again he assured me that, 'Pascoe will have them buildings up there the first week of May.' . . . He shook hands and promised me again that they would be there the first week of May." (Certified Record - Appendix, p. A-34).

Mr. Slechta testified as to the conversation but was not sure as to whether or not Mr. McCarthy was talking about shipping dates or delivery dates (Certified Record - Appendix, pp. 61-62).

A mere statement of an intention to act in a certain way is not a promise upon which a contract can be predicated. *Hayashi v. Ihringer*, 58 N.W.2d 788 (N.D. 1953).

The trial court at no point in its Memorandum Decision ever indicated what conversation between the parties or their representatives constituted the oral contract, nor did the Court of Appeals in its Order of Affirmance and in its Order Denying the Petition for Rehearing. In the Peti-

tion for Rehearing, the point was specifically directed to the appellate court's attention (Certified Record - Petition for Rehearing, p. 4). Since the existence of the alleged oral contract is vital to the judgment entered in favor of the respondent, we submit it is equally vital to the entire proceeding that the specific conversations constituting the oral contract could be designated by the Court in its Memorandum Opinion, its Findings of Fact and Conclusions of Law.

The Court's attention is directed to the fact that when these two parties entered into this venture, they were entering into a venture as joint bidders and submitted one bid for the project. One joint bid contemplated the award of one contract to the two joint bidders. If this would have occurred, there would be no reason for any special oral contracts between the two litigants, Wieman-Slechta or Pascoe. It was only after the joint bid was submitted that they were informed that two contracts would be entered into, one between Morrison-Knudsen and Wieman-Slechta, and the other contract between Morrison-Knudsen and Pascoe. After receiving that information, the Pascoe representative (McCarthy) was taken to the airport; the parties separated and never saw each other again. It is only the conversation after the submission of the joint bid that could be considered as constituting the oral contract and we submit that any such testimony of these conversations after the submission of the joint bid is not sufficient to establish the contract that is vital to the respondent's case and upon which its judgment rests.

CONCLUSION

For the foregoing reasons the petitioner asks the Court to grant this Petition for the issuance of a Writ of Certiorari to the Court of Appeals for the Eighth Circuit and review the proceedings of that court and the trial court as to the points and issues raised herein.

Respectfully submitted,

EDWARD C. GILLIG
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Grand Forks, North Dakota 58201
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

WIEMAN-SLECHTA CO., a Nebraska Corporation,
Plaintiff,

vs.

PASCOE STEEL CORPORATION, a Georgia Corporation,
Defendant.

CIVIL NO. 4710

APPEARANCES

For the plaintiff, Theodore M. Camrud, Esq., of Degnan, McElroy, Lamb, Camrud & Maddock, Ltd., Grand Forks, North Dakota; and James F. Kasher, Esq., of Brady, Kasher & McDonnell, Omaha, Nebraska.

For the defendant, Paul G. Woutat, Esq., of Stokes, Vaaler, Gillig, Warcup & Woutat, Grand Forks, North Dakota.

MEMORANDUM OPINION

On April 1, 1970, Morrison-Knudsen Company and Associates (Morrison-Knudsen) entered into a contract with the United States for construction of a Safeguard Ballistic Missile Defense System Facility near Grand Forks, North Dakota. In need of a number of temporary steel buildings to be located at various missile sites, Morrison-Knudsen

contacted several steel fabricators, including the defendant, Pascoe Steel Corporation (Pascoe), Columbus, Georgia, seeking bids for the fabrication and erection of the buildings.

Desirous of bidding, but not having a steel erection crew available, Pascoe's District Sales Manager contacted the plaintiff, Wieman-Slechta Co. (Wieman-Slechta), one of its franchised dealers located in Omaha, Nebraska, to inquire if they would be interested in joining Pascoe in submitting a bid. Wieman-Slechta initially declined, but later agreed to meet with Pascoe in Grand Forks to confer with representatives of Morrison-Knudsen concerning a possible bid.

Present at the first meeting on Thursday evening, April 9, 1970,[1] were John McCarthy, Pascoe's Regional Sales Manager; William Wieman and Everett Slechta of Wieman-Slechta; and Larry Swanson, one of Morrison-Knudsen's General Superintendents. Discussed during this and subsequent meetings held the next day were the general requirements and specifications for the steel buildings, the number needed, a tentative completion date for the second or third week of June, 1970, the potential labor market for steelworkers, availability of Morrison-Knudsen equipment to be used by Wieman-Slechta, and the method to be utilized by Pascoe in shipping component parts of the buildings.

On Friday, April 10th, Mr. Wieman and Mr. Slechta spent most of their time assembling prices for labor and materials needed, while Mr. McCarthy contacted his home office as to the availability of the buildings, their cost and delivery dates. The three conferred at various times con-

[1]At the time of trial the participants were unable to recall specific dates, but agreed that this meeting took place the week preceding the signing of the Wieman-Slecha—Morrison-Knudsen contract on April 14, 1970.

cerning the proposed bid, delivery dates and the time needed for completion if their bid was accepted by Morrison-Knudsen. Mr. Wieman and Mr. Slechta were concerned that if the buildings were not completed by the time Morrison-Knudsen commenced hiring steelworkers, a labor shortage would develop and excessive costs incurred. Also discussed were the load restrictions imposed by the North Dakota Highway Department when roads in the area began to thaw. Mr. McCarthy assured them that the buildings would be available and that their component parts would be delivered in time to be erected by the completion date set by Morrison-Knudsen.

Friday evening Mr. Wieman, Mr. Slechta and Mr. McCarthy again met with representatives of Morrison-Knudsen to submit a joint bid in the name of Wieman-Slechta covering the supplying and erection of the buildings. Just prior to submitting the bid Mr. Wieman again inquired of Mr. McCarthy whether the delivery of the steel buildings could be assured for six weeks prior to whatever completion date was set by Morrison-Knudsen and he was again told that the buildings could be delivered whenever needed since they were mainly standard and readily available. Mr. McCarthy then submitted the bid to the Morrison-Knudsen representatives who rejected it as being $2.000 higher than that of several other steel fabricators. The matter was discussed and, while Morrison-Knudsen preferred the Pascoe buildings, the total cost for the buildings and their erection could not exceed that of the other bidders. It was then determined that if Pascoe were to sell the buildings direct to Morrison-Knudsen on a cash basis, a discount of one-half of one per cent—10 days—net 30 days—could be allowed. This would reduce Wieman-Slechta's bonding costs and bring the overall cost to Morrison-Knudsen in line with

the other bids submitted. This arrangement was acceptable.

Final completion date was set for June 15, 1970, a requirement that Morrison-Knudsen insisted be met since that date would also be their start-up date and the buildings would be needed. Mr. McCarthy assured all concerned that the component parts of the buildings to be erected first would be on the sites the first week of May. Wieman-Slechta was promised the use of Morrison-Knudsen cranes and other equipment at no cost until needed by Morrison-Knudsen about June 15th. It was then agreed that the component parts of the buildings were to be shipped via trailers on railroad flat cars (TOFC). The meeting concluded with the understanding that Pascoe would furnish the component parts for 14 buildings pursuant to a Morrison-Knudsen purchase order and that a separate contract would be prepared covering Wieman-Slechta's providing concrete foundations and slabs for the buildings and their erection. Before leaving Grand Forks Mr. Wieman, Mr. Slechta and Mr. McCarthy again discussed difficulties that would arise if the component parts of the buildings did not arrive at the sites on time and Mr. McCarthy again promised that the component parts would begin arriving the first week of May.

Mr. Slechta returned to Grand Forks the following Monday and entered into a contract with Morrison-Knudsen, April 14th, on behalf of Wieman-Slechta. This contract provided, in part, that:

"1. Contractor will be Owner's agent for and will be charged with the total responsibility for ordering and assuring delivery of all materials required hereunder and in that connection Contractor acknowl-

edges Owner's purchase order with Pascoe Steel Corporation for buildings and will closely coordinate its efforts with the shipping schedule of Pascoe Steel Corporation and the schedule of the Owner's original contract realizing that time is of the essence of the original contract and of this contract.

* * * * *

"7. All buildings covered hereunder are to be completed and accepted by the Owner not later than June 15, 1970, and Contractor agrees to make every effort to complete all of the said buildings in advance of such date."

Wieman-Slechta began preparing and pouring the concrete foundations about the 27th of April and the first four foundations were ready on or about May 4th for erection of the first buildings with all 14 foundations and slabs being completed by the end of May.

Upon Mr. McCarthy's return to Columbus, Georgia, he submitted a memo to the Pascoe Distribution Division, dated April 20, 1970, concerning the sale of the buildings to Morrison-Knudsen which contained, as far as pertinent, the following:

"During the negotiations for these buildings, several items were discussed that I believe we all should be aware of to avoid any difficulties as the project progresses.

"1. Buildings were sold directly to Morrison and Knudsen to be delivered rail freight.

"2. Terms quoted are ½ of 1% 10 days, net 30 on receipt of material.

"3. (2) warehouse buildings and (2) Carpenter shops are the first buildings to be shipped. Each building should be marked for identification by color code or some other method that they can be easily separated at time of unloading to get to the proper jobsite.

"4. Since our Builder, Wieman and Slechta of Omaha is responsible for the erection through a contract with Morrison and Knudsen, they should be copied on all transmittals, shipping lists, routing and any other information pertinent to the movement of the shipment and should be sent a separate copy of all drawings. Everett Slechta is the person who will be representing Wieman and Slechta.

"5. Sketches and a priority list are to be mailed to me by Mr. Larry Swanson of Morrison-Knudsen and Associates, P. O. Box 1683, Grand Forks, North Dakota.

"6. Attached is a map showing actual missile sites.

"7. Piggy back ramps and rail sidings are available as follows:

Par Site—Hensel Siding
Msr Site—Necoma (sic) Siding

"8. Sketches for balance of buildings and priority attached."

Pascoe immediately commenced fabrication of the buildings and the preparation of shop drawings.

On April 28th Pascoe received a purchase order for the buildings from Morrison-Knudsen, dated April 15th, which provided, in part, that:

"The Seller acknowledges that time is the essence of Buyer's contract with the Corps of Engineers and is aware of the completion requirements placed upon Wieman Slechta Company in its agreement with Buyer.

"Seller acknowledges that Buyer has entered into a contract with Wieman Slechta Company of Omaha, Nebraska, whereunder Wieman will, as agent for Buyer, receive and erect in place, all buildings ordered hereunder. Seller agrees with this arrangement and will closely coordinate with Wieman Slechta Company to assure that an adequate flow of building materials is on hand at the job site at all times to allow Wieman to satisfactorily comply with the terms of its contract with Buyer. Seller agrees to receive shipping orders from Wieman and to ship such orders in accordance with the quantities, sizes, specifications and delivery times set forth therein.

* * * * *

"Delivery—Items 1 and 5, shipment 4-27-70, or before. Balance of building to be shipped in their entirety May 4, 1970, or before. Sequence of delivery Items 1 and 5, Items 3-4-8-9-6-7-2 Terms ½ of 1%—10 days, Net 30 days on receipt of material."

A copy of the contract between Wieman-Slechta and Morrison-Knudsen did not accompany the purchase order nor was Wieman-Slechta furnished a copy of the purchase order.

On April 29, 1970, after a meeting with Morrison-Knudsen representatives in Grand Forks on the 24th and a telephone conversation with them on the 28th, Mr. Mc-

Carthy wrote a letter to Morrison-Knudsen's purchasing agent in which delivery date of the steel buildings was changed to a shipping schedule. The letter relating thereto reads as follows:

> "The second item was shipping schedule and if you will recall I told you in Grand Forks I heard second hand about deliveries and would advise you as to the actual schedule. This I gave you over the phone today and told you I would confirm this. The following is the shipping schedule and sequence that is to be followed:
>
> Items 1 and 5 scheduled shipment for week ending 5/8/70.
>
> Items 2, 3, 4, 6 and 7 scheduled shipment for week ending 5/15/70.
>
> Items 8 and 9 scheduled shipment for week ending 5/22/70."

Neither Morrison-Knudsen nor Pascoe notified Wieman-Slechta of the changed shipping schedule.

On May 1st, in a letter to Morrison-Knudsen's purchasing agent Pascoe's contract administrator again confirmed the revised shipping schedule as contained in Mr. McCarthy's letter, stated that shipment of the first buildings was on schedule and they would be shipped the following week, and acknowledged that time was of the essence but denied being aware of the completion requirements placed upon Wieman-Slechta by Morrison-Knudsen.

By May 6th Wieman-Slechta was informed that Pascoe was shipping the buildings by rail freight and wired Pascoe that:

> "Shipment of metal buildings except by trailer is not authorized. Trailer service is available. Your organization will be responsible for drayage if shipment made by other methods."

On May 7th, after a telephone conversation the previous evening, Pascoe's contract administrator wrote Morrison-Knudsen's resident manager that their quotation covering the cost of shipment was rail freight, not TOFC, the latter being considerably more expensive, but that they were shipping the first four buildings TOFC, collect, to Morrison-Knudsen in care of Wieman-Slechta, Hensel, North Dakota. On the same date Morrison-Knudsen prepared a change order to Pascoe setting forth site designations for the buildings shipped TOFC, FOB vendor's plant, Columbus, Georgia. The shipping schedule was again set forth as being:

> "Items 1 and 5—shipment week ending May 8, 1970, or before. Items 2, 3, 4, 6 and 7 shipment week ending May 15, or before. Items 8 and 9 shipment week ending May 22, or before.
>
> "All other terms and conditions of the original order to remain the same and to apply hereto."

On May 8th Pascoe informed Mr. Wieman that to separate the four buildings covered by items 1 and 5 would require four trailers and that to save freight the panels for all four buildings would be loaded on one trailer and the remainder of the component parts of item 1 (two warehouses) and item 5 (two carpenter shops) on one trailer each. When Mr. Slechta became aware of this arrangement he contacted Pascoe's contract administrator to re-

mind him that load restrictions were in effect due to thawing conditions in the area and that the North Dakota Highway Department would not permit movement of trailers which exceeded 30,000 pounds in weight.

On May 16th Morrison-Knudsen sent Pascoe's contract administrator a copy of their contract with Wieman-Slechta and stated, "We see nothing objectionable about requiring your awareness of that agreement as provided in your purchase order."

Of the first four buildings to be erected, two were shipped on May 12th and arrived at the sites June 1st and 2nd (item 1); the last two were shipped on May 25th and arrived June 8th and 13th (item 5). The remaining buildings were shipped and received as follows:

> "Item 2 (two change houses) shipped May 12th, arrived June 1st and 2nd;
>
> Item 3 (one machine shop) shipped May 5th, arrived June 13th;
>
> Item 4 (one machine shop) shipped May 25th, arrived June 8th;
>
> Item 6 (one mechanical shop) shipped May 25th, arrived June 13th;
>
> Item 7 (one machine shop) shipped May 25th, arrived June 8th;
>
> Item 8 (two electrical shops) shipped May 26th and 28th, arrived June 10th and 23rd;
>
> Item 9 (two fabrication shops) shipped May 26th and 28th, arrived June 10th and 23rd.

Wieman Slechta commenced erection of item 1 im-

mediately upon their arrival.[2] This was also true of items 4 and 7. However, when item 5 arrived, a priority item, work on 4 and 7 ceased until item 5 could be completed.

On June 24th Wieman-Slechta, unaware of the changed shipping schedule agreed to by Morrison-Knudsen and Pascoe, wrote to Morrison-Knudsen concerning the late delivery of the buildings as follows:

> "At the time we submitted Morrison-Knudsen a bid proposal on the above mentioned project, Pascoe Steel promised both our companies the buildings would be on the job May 15, 1970.
>
> "Morrison-Knudsen issued a purchase order for the buildings direct with Pascoe, however, you are still holding Wieman-Slechta Co. responsible for delivery as in Contract Article XXI Item 1. Did you stipulate a delivery date in your purchase order to Pascoe?
>
> "Now we are incurring heavy extra costs in making up the two weeks the buildings were late and I feel Pascoe should help pay some of this cost, as they did not fulfill their order as promised so we could make our completion date. The problem is if we had issued

[2]On May 5th Wieman-Slechta had subcontracted to C. G. Welding Co. for the furnishing of all labor for erection of the 14 metal buildings, including insulation and sheet metal and accessories, at a price of $37,000. This contract did not contain either a commencement or completion date, but C. G. Welding was aware that Wieman-Slechta was required to have the building completed by June 15th and had been told by Mr. Wieman that Pascoe had promised the component parts of the buildings would begin arriving on the sites the first week of May. From telephone conversations with Pascoe the first week in May Wieman-Slechta learned that the component parts for the first buildings to be erected were just being loaded and so then informed C. G. Welding that they would arrive by May 15th. C. G. Welding arrived on the sites with men and equipment May 13th. When the first shipments had not arrived by May 22nd, Wieman-Slechta agreed to relieve C. G. Welding of any obligations it might have under their contract.

> Pascoe a purchase order we would have had a delivery date stated and thus had something to go against them with.
>
> "What we are requesting is that Morrison-Knudsen Co. hold payment in the amount of $20,000.00 from Pascoe until we settle with them. We feel this is justifiable as you are holding us responsible for delivery of the buildings."

Subsequent to the completion of its contract Wieman-Slechta for the first time became aware of the change order of May 7th, in which Morrison-Knudsen referred to Pascoe's shippping schedule, and asserted against Morrison-Knudsen a claim for the extra costs incurred due to the late arrival of the buildings. Conceding it was partially responsible, this claim was settled for the sum of $15,000.-00, Wieman-Slechta reserving its right to proceed against Pascoe. This action followed.

The evidence clearly establishes that Morrison-Knudsen would not have purchased the buildings from Pascoe if Wieman-Slechta had decided not to enter into a contract for erection of the buildings and for the furnishing of the necessary foundations and slabs, and it is equally clear that it was only after repeated assurances by Pascoe's regional sales manager that the component parts of the buildings would begin arriving at the sites the first week in May that Wieman-Slechta signed its contract with Morrison-Knudsen.

As the buildings failed to arrive within the time and in the order that Pascoe had promised, Wieman-Slechta encountered all the anticipated difficulties which had been discussed with Pascoe's regional sales manager prior to

submitting their bid and, in addition, were compelled to work around and over Morrison-Knudsen's men, equipment and material. Cranes had to be rented and, to expedite the work, additional steelworkers employed. All the buildings were finally competed is late July at a total erection cost of $110,449.75 far in excess of Wieman-Slechta's anticipated cost of $40,000.00, Pascoe's estimate of $45,-000.00 and C. G. Welding's subcontract of $37,000.00.

As a proximate result of the buildings arriving late, over a period of 23 days rather than within a one-week period and not in the sequence as promised by Pascoe, Wieman-Slechta incurred increased costs for wages, union benefits, workmen's compensation, unemployment and FICA taxes, subsistence pay, salaries for supervisory personnel, administrative overhead, and insurance, together with unanticipated crane rental.

Using Wieman-Slechta's figure of $40,000.00 as the reasonable cost for the erection of the steel buildings, damages in the sum of $70,449.71 were incurred. These damages have been allayed to some extent by the payment of $15,000.00 by Morrison-Knudsen in settlement of any responsibility that it had relating to the late shipment of the component parts of the steel buildings. This leaves unsatisfied damages of $55,449.71 which are directly attributable to Pascoe's actions. Wieman-Slechta is entitled to judgment against Pascoe Steel in the amount of $55,449.71, together with interest provided by law and costs of this action to be fixed and set by the Clerk of this Court.

Plaintiff's counsel will prepare and submit form of judgment to the Clerk of this Court at his Fargo office.

The foregoing constitutes the Court's findings of fact

and conclusions of law pursuant to Fed. Rules Civ. Proc. rule 52.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Fargo, North Dakota, this 13th day of December, A.D. 1972.

/s/ RONALD N. DAVIES
Senior United States District Judge

SUPREME COURT U.S.
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

MARCH TERM, 1974

No. 73-1299

PASCOE STEEL CORPORATION, a Georgia corporation,

Petitioner,

vs.

WIEMAN-SLECHTA CO., a Nebraska corporation,

Respondent.

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1204

WIEMAN-SLECHTA CO., A Nebraska Corporation,
Plaintiff-Appellee,

vs.

PASCOE STEEL CORPORATION, A Georgia Corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the District of North Dakota

Submitted: October 16, 1973

Filed: October 24, 1973

Before HEANEY, ROSS and STEPHENSON, Circuit Judges

ORDER OF AFFIRMANCE

Upon a careful consideration of the record and of the briefs and arguments of the parties, the Court has concluded that the judgment of the District Court is based on findings that are not clearly erroneous, that no error of law appears, and that an opinion would have no precedential value. For these reasons the judgment appealed from is hereby AFFIRMED without opinion. See Rule 14 of the Rules of this Court.

Transmittal Letter

November 20, 1973

Mr. Robert Vaaler
Two North Third Street
P.O. Box 1617
Grand Forks, North Dakota 58201
Messrs. James F. Kasher,
Patrick H. McDonnell
210 First West Side Bank Bldg.
222 South 72nd Street
Omaha, Nebraska 68114

Re: No. 73-1204. Wieman-Slechta Co. v. Pascoe Steel Corporation.

Dear Sirs:

Enclosed herewith please find copy of order entered by us today at the direction of the Court.

Very truly yours,

Robert C. Tucker
Clerk

lp

Appeal from the United States District Court
for the District of North Dakota

No. 73-1204

September Term, 1973

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

November 20, 1973

November 30, 1973

Mr. Robert Vaaler
Two North Third Street
P. O. Box 1617
Grand Forks, North Dakota 58201

Messrs. James F. Kashar,
Patrick H. McDonnell
210 First West Side Bank Bldg.
222 South 72nd Street
Omaha, Nebraska 68114

Re: No. 73-1204. Wieman Slechta Co. v. Pascoe Steel Corp.

Dear Sirs:

The mandate of this Court in the above case is being issued today and sent to the Clerk of the United States District Court at Fargo, North Dakota.

Very truly yours,

Robert C. Tucker,
Clerk
By /s/ W. J. GRUENONGER
Chief Deputy Clerk

eh

Notice of Entry of Judgment Pursuant to Order of United States Court of Appeals

Civil No. 4710

Appeal No. 73-1204

PLEASE TAKE NOTICE that the above JUDGMENT of which the inclosed is a copy, was duly entered in the above entitled action on December 3, 1973.

Dated this 3rd day of December, 1973.

CLETUS J. SCHMIDT
Clerk
By /s/ ANNE SYLVESTER
Deputy Clerk

Copies to:

Theodore M. Camrud, Attorney, P. O. Box 818, Grand Forks, N D 58201 Brady & Kasher, Attorneys, 210 First West Side Bank Bldg., 222 South 72nd Street, Omaha, Nebraska 68114
Paul G. Woutat, Attorney, P. O. Box 847, Grand Forks, N D 58201

Judgment Pursuant to Order of United States Court of Appeals

Pursuant to Order of the United States Court of Appeals for the Eighth Circuit affirming the Judgment of the District Court filed and entered on December 26, 1972, and said Order has allowed costs to the appellee as taxed by the Eighth Circuit Court of Appeals as follows:

Costs taxed in favor of the Appellee:

Costs of printing 25 copies of Appellee's brief:	$365.97
Total Costs of Appellee for recovery from Appellant in the U. S. District Court:	$365.97

IT IS ORDERED that the Appellee, Wieman Slechta Co., have and recover of the Appellant, Pascoe Steel Corporation, the sum of $365.97, as appears from said Order, and have execution therefor.

Dated at Fargo, North Dakota, this 3rd day of December, 1973.

/s/ RONALD N. DAVIES
Senior Judge
United States District Court

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

MARCH TERM, 1974

No. 73-1299

PASCOE STEEL CORPORATION,
a Georgia Corporation,
Petitioner,

vs.

WIEMAN-SLECHTA CO.,
a Nebraska Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM IN OPPOSITION

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Rule 52 of the Federal Rules of Civil Procedure 4, 5

CONSTITUTION CITED

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IN THE

Supreme Court of the United States

MARCH TERM, 1974

—o—

No. 73-1299

—o—

PASCOE STEEL CORPORATION,
a Georgia Corporation,
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WIEMAN-SLECHTA CO.,
a Nebraska Corporation,
Respondent.

—o—

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

MEMORANDUM IN OPPOSITION

—o—

Petitioner contends that the decision of the United States District Court in North Dakota violates Rule 52 of the Federal Rules of Civil Procedure in that it fails to find facts specially and to state its conclusions of law with respect thereto. Petitioner contends that this failure also amounts to a denial of due process in violation of the Fifth Amendment to the United States Constitution.

Petitioner further contends that the decision of the United States District Court, as affirmed by the Court of Appeals for the Eighth Circuit, is contrary to statutory and case law in North Dakota with respect to the so-called parol evidence rule and the law governing formation of contracts.

—o—

STATEMENT OF CASE

This case was filed by Wieman-Slechta Co., a Nebraska Corporation ("Wieman"), against Pascoe Steel Corporation, a Georgia Corporation ("Pascoe"), in the United States District Court for the District of North Dakota.

The Complaint alleged that Pascoe promised the delivery of certain components to a building construction site by a certain specified date and that Wieman, in reliance of this promise, entered into a contract with a third party, Morrison-Knudsen Company & Associates ("Morrison-Knudsen"), for the construction of these steel buildings with a designated completion date. Pascoe failed to deliver the components in accordance with its promised delivery dates and Wieman suffered substantial damage. The Complaint requested the recovery of damages in the amount of Seventy-Three Thousand Four Hundred Forty-Nine Dollars and Seventy-One Cents ($73,449.71).

The case was tried to the District Court in Grand Forks, North Dakota, and resulted in a judgment in favor of Wieman in the amount of Fifty-Five Thousand Four Hundred Forty-Nine Dollars and Seventy-One Cents ($55,449.71). The decision of the District Court was rendered by Memorandum Opinion of eleven typewritten pages.

Petitioner filed a motion for amended findings for a new trial which was denied by the District Court.

Petitioner appealed to the Court of Appeals for the Eighth Circuit. That Court affirmed the decision of the District Court. A Petition for Rehearing En Banc was denied without opinion by the Court of Appeals.

STATEMENT OF FACTS

The facts of this case involve, generally, agreements concerning the construction of a number of steel warehouse buildings for use by Morrison-Knudsen at a construction site in North Dakota. Pascoe was interested in providing the component parts for these steel buildings and invited Wieman to work with Pascoe in making a presentation to Morrison-Knudsen.

The two principals of Wieman met the sales manager of Pascoe in Grand Forks, North Dakota, where several meetings were held with representatives of Morrison-Knudsen. The various details of the project were discussed, including a proposed completion date, which was to be June 15, 1970. After some involved discussions, the parties agreed that Pascoe would supply the steel buildings and Wieman would construct the buildings on the site. Pascoe and Wieman had separate contracts with Morrison-Knudsen for the purpose of accomplishing the complete project.

Throughout the discussions, Pascoe's representative repeatedly promised the Wieman representatives that the steel buildings would be delivered to the construction site during the first week of April, 1970. Wieman representatives told the Pascoe representative that Wieman would not enter into the agreement with Morrison-Knudsen without Pascoe's promise to make timely delivery in this manner. Understanding that Wieman was relying on this promise and being fully aware of the damages that could accrue to Wieman in the absence of a timely delivery, Pascoe's representative promised the Wieman representa-

tives that the steel building component parts would be delivered during the first week of April, 1970.

Relying on this promise, Wieman proceeded to enter into a contractual arrangement with Morrison-Knudsen. Pascoe also agreed with Morrison-Knudsen to supply the component steel parts. Because of the number of purchase orders, letters, telephone conversations and other communications which passed between Pascoe and Morrison-Knudsen, it is impossible to determine exactly what writing, if any, constituted the agreement between Pascoe and Morrison-Knudsen.

In spite of the importance placed by all parties on timely delivery, the steel buildings were delivered over a month later than they had been promised, out of the order in which they were to be delivered and in a very staggered fashion. This caused substantial problems and resultant damages for Wieman. Substantial evidence was introduced at the trial to show the extent, amount and nature of the damages to Wieman.

DISCUSSION OF ISSUES

I.

The District Court's Memorandum Opinion meets the requirements of Rule 52 of the Federal Rules of Civil Procedure and does not violate the Due Process Provisions of the Fifth Amendment to the United States Constitution.

Pascoe has contended that the memorandum opinion filed by the District Court fails to meet the requirements

of Rule 52 (a) of the Federal Rules of Civil Procedure. Wieman believes that the requirements have been met and that the District Court has set forth a complete statement of facts which fully justify the conclusions of law made by the District Court.

The memorandum opinion surpasses the minimal requirements which are stated in *United States v. F. D. Rich Co., Inc.*, 439 F. 2d 895 (8th Cir. 1971), at pages 898-899:

> "Appellant Rich asserts that the trial court failed to make the necessary findings to permit an adequate appellate review. Appellant specifically charges the findings relating to Vaught's alleged delay in performance were inadequate to sustain the trial court's conclusions of law. The trial judge made no separate findings, but instead incorporated them into his unreported memorandum opinion. Although the opinion does not elaborate or detail each subsidiary issue raised by the defendant Rich in its claim for delay damages, the trial court clearly indicated the evidentiary basis for its decision on this issue. It recited, as an ultimate finding:
>
> > 'the defendant has wholly failed to sustain the burden of proof on the affirmative defense of damage to the defendant by unreasonable delay.'
>
> Although more extensive findings are certainly helpful in a case as complex as this, the district court's memorandum opinion sufficiently outlines the basis and underlying grounds for its decision, which is all that is required. Christensen v. Great Plains Gas Company, 418 F. 2d 995, 1000 (8th Cir. 1969); Freeman v. Gould Special School District, 405 F. 2d 1153, 1156 (8th Cir.), cert. denied, 396 U. S. 843, 90 S. Ct. 61, 24 L. Ed. 2d 93 (1969); Manning v. Jones, 349 F. 2d 992, 996 (8th Cir. 1965). See also, Glassman

> Construction Company v. United States for Use and Benefit of Clark-Fontana Paint Co., 421 F. 2d 212 (4th Cir. 1970) (Miller Act case); Seligson v. Roth, 402 F. 2d 883 (9th Cir. 1968). Appellant Rich, who presented the trial court with 156 proposed findings, misconstrues the requirements of Rule 52 (a), Fed. R. Civ. P. *The trial court need not make specific findings on all facts necessary to reach a decision in the case.* Skelly Oil Co. v. Holloway, 171 F. 2d 670, 673, (8th Cir. 1948). See generally, 5 Moore, Federal Practice ¶ 52.05[1] (2d ed. 1969)."

It is further stated in *Freeman v. Gould Special School District of Lincoln, County, Arkansas,* 405 F. 2d 1153 (8th Cir. 1969), at page 1156, that:

> "While the findings might be more detailed, we believe Judge Harris' findings comply with Rule 52 (a), Fed. R. Civ. P. As articulated by Judge Mehaffy in Manning v. Jones, 349 F. 2d 992, 996 (8th Cir. 1965):
>
> "'* * * [A] district court's findings of fact must be liberally construed and found to be in consonance with the judgment if the judgment has support in the record evidence. * * * This is so even if the findings are not as specific or detailed as might be desired.'"

The defendant Pascoe has placed considerable stress on the parol evidence rule. The district court has made detailed findings of fact which make it abundantly clear as to what evidence was considered by the district court. Parol evidence was obviously considered and it is inherent in the memorandum opinion that the issue of the application of the parol evidence rule has been resolved against the defendant Pascoe.

Pascoe is also concerned about the question of proof required by the laws of North Dakota. It is most clear

from the memorandum opinion that the district court has found that a promise was made to Wieman that was binding upon the defendant Pascoe. As stated above, if the judgment has support in the record evidence, the district court's findings of fact must be liberally construed and found to be in consonance with the judgment. It is clear that the district court found that the quantum of proof was sufficient to support the finding that the promise was made—that is inherent in the finding itself.

Respondent Wieman simply submits that it is not necessary that the district court make a citation to a case or to a statute in support of each and every finding of fact or conclusion of law made. The basis for the decision of the district court is clear.

The issues presented in this case were fairly tried before the district court and a full and complete memorandum opinion was rendered by the district court. The issues were clear and the basis upon which the district court made its decision is equally clear. Due process of the law throughout these proceedings has certainly been granted to Pascoe. Pascoe appears to complain mainly because it is unhappy with the decision rendered and not because of any violation of due process or of any other constitutional right.

II.

The Memorandum Opinion of the District Court complies with the statutory and case law of the State of North Dakota.

Pascoe has placed great emphasis on the parol evidence rule which is embodied in the statutes of North

Dakota. Wieman presented numerous arguments to the District Court as to why the parol evidence rule should not be applied in the instant case. Pascoe made no substantial effort to refute any of the arguments submitted by Wieman. Among these arguments, supported by North Dakota case law, were the following:

A. There was no written agreement between Wieman and Pascoe. Pascoe wishes to apply the parol evidence rule to a contract between itself and a third party or between Wieman and a third party. The parol evidence rule applies only to contracts between the parties involved.

B. There was no specific written contract between Morrison-Knudsen and Pascoe. Pascoe attempted to rely on a series of purchase orders, letters, telephone conversations and other communications, all of which may have constituted a contract, but none of which can be considered to be a written contract standing alone.

C. The agreement which was established by Wieman at the trial was an agreement separate and distinct from any of the written agreements among Wieman, Morrison-Knudsen and Pascoe. In the absence of the specific promise of timely delivery from Pascoe to Wieman, there would not have been any agreements between Wieman and Morrison-Knudsen and Pascoe and Morrison-Knudsen. Accordingly, this oral agreement between Pascoe and Wieman was separate and distinct and would not have been merged into any of the written documents.

Evidence at the trial clearly showed the existence of the oral agreement for timely delivery between Pascoe

and Wieman. The finding of the District Court was specific in this regard. There was little question under the evidence presented that the requirements of a binding contract in North Dakota have been fully met.

CONCLUSION

In accordance with the foregoing, it is respectively submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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